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The Hangover Effect of Mitchell v. Wisconsin

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I. Introduction

The United States has long faced a history of accidents relating to alcohol-impaired driving. In order to combat the problem, Congress enacted a federal statute in 1984 directing states to raise the in-state drinking age to twenty-one or, as a consequence, receive less highway funding.[1] The aim was to stop drivers who were younger than the requisite drinking age from crossing state borders to drink where the legal drinking age was lower.[2] According to Congress, and with the Supreme Court's stamp of approval, the statute was enacted as a means for states to secure federal funds by keeping their highways safe.[3]

Today, all fifty states have enacted laws that prohibit motorists from driving with a blood alcohol concentration ("BAC")[4]—defined as the level of alcohol in the blood—that exceeds 0.08%.[5] Even with these laws in place, drunk driving is the leading cause of highway deaths,[6] killing more than 10,000 individuals in alcohol-impaired driving crashes per year.[7] Of all motor

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[1] 23 U.S.C. § 163 (2018); South Dakota v. Dole, 483 U.S. 203, 205 (1987).

[2] *Dole*, 483 U.S. at 208–09.

[3] *Id.* at 208.

[4] ROBERT L. DUPONT, THE SELFISH BRAIN: LEARNING FROM ADDICTION 131 (1997). ("When a person drinks alcohol, the alcohol is distributed . . . evenly throughout the person's body. . . The biggest factors governing BAC, however, are not gender or weight, but how much a person drinks and how long after the drink is consumed the BAC is checked. This is because the liver is efficient at metabolizing alcohol. The liver can break down one drink of alcohol (0.5 ounce) into carbon dioxide and water in about an hour and a half.") *Id.* at 132.

[5] Birchfield v. North Dakota, 136 S. Ct. 2160, 2166 (2016); *see also* Editorial Staff, *Legal BAC Limits in Different States, Counties, & Cities*, https://www.alchol.org/dui/bac-limits/ (last updated July 18, 2019). Some states are considering enacting a lower BAC limit—0.05%—with Utah leading the way by already adopting such a measure. Angie Schmitt, *Other States Should Copy Utah's New Drunk Driving Rule*, STREETSBLOG USA, (Jan. 4, 2019) https://usa.streetsblog.org/2019/01/04/why-other-states-should-copy-utahs-new-drunk-driving-rule/.

[6] Becky Ianotta, *New NHTSA Numbers Show Drunk Driving Still the Leading Cause of Highway Deaths*, MOTHERS AGAINST DRUNK DRIVING (Oct. 3, 2018), https://www.madd.org/press-release/new-nhtsa-numbers-show-drunk-driving-still-the-leading-cause-of-highway-deaths/.

[7] *Alcohol-Impaired Driving*, NAT'L HIGHWAY TRANSPS. SAFETY ADMIN., https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630.

vehicle accidents, 29% are the result of alcohol-impaired driving incidents.[8] These statistics reflect the problem this country faces in its uphill battle to combat drunk-driving related incidents.

The statistics also provide the underlying reasons for why most states have enacted "implied consent laws." These laws pronounce that drivers agree to submit to chemical tests of the breath, blood, or urine to determine alcohol or drug content if asked to do so by a law enforcement officer, just by virtue of driving in that state.[9] While the purpose of such laws is to impose penalties on drivers who refuse to undergo testing, the laws may nonetheless violate the Fourth Amendment's prohibition against unreasonable searches of the person. Drivers are faced with a conundrum, because while they deserve their constitutionally protected right to be free from warrantless searches, implied consent laws genuinely leave them with minimal options.

This Comment addresses the Supreme Court's recent decision in *Mitchell v. Wisconsin*,[10] which held that police officers may "almost always" order a warrantless blood test under a statute like the ones mentioned above, to measure an unconscious driver's BAC without offending the individual's Fourth Amendment right against unreasonable searches of their person. Part II of this Comment will describe the history of driving under the influence ("DUI") or while intoxicated ("DWI") laws[11] and the reasons behind their implementation. Part II will also address the Supreme Court's recognition of the serious issue that the United States has faced with impaired driving.

Part III will then provide an objective overview of cases that were decided before *Mitchell* and their implications on criminal procedural law under both the Fourth and Fifth Amendments. Part IV will comprehensively break down the split in *Mitchell*, focusing primarily on the plurality,

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[8] *Id.*

[9] *Birchfield*, 136 S. Ct. at 2166; *Implied Consent Law*, DRIVERSED.COM, https://driversed.com/resources/terms/implied_consent_law.aspx (last visited Oct. 16, 2019).

[10] Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

[11] These terms will be used interchangeably throughout this Comment for brevity.

written by Justice Alito, and the dissent, written by Justice Sotomayor. Part V pays special attention to how *Mitchell* fits with past precedent, if at all. It begs to answer the question of why there was a sudden need for change in DUI law standing doctrine and how the opinion should be applied moving forward. In total, this Comment will argue that the Supreme Court should either come forward with a bright-line rule using the traditional analysis focusing on the exigent circumstances exception to the Fourth Amendment, or state that DUI cases are subject to a public policy reasonableness standard—the governmental need of ensuring safe roads. By resting *Mitchell* on two rationales, lower courts will struggle to determine the parameters and limits of the decision, thereby possibly jeopardizing Fourth Amendment protections as a whole.

II. Historical Background of DUI Laws and Their Significance

In the United States today, one person dies nearly every 50 minutes because of a motor vehicle crash involving an alcohol-impaired driver, which amounts to 30 people per day.[12] Over 10,000 people are killed in alcohol-impaired driving crashes per year.[13] It is estimated that accidents attributable to alcohol-impaired drivers annually impose costs upward of $37 to $44 billion a year.[14] Furthermore, the Federal Bureau of Investigation's ("FBI") statistics reflect that over one million drivers were arrested for DUI in 2018.[15] Yet, this pales in comparison to the 112 million adults in America who self-report episodes of alcohol-impaired driving each year.[16]

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[12] *Impaired Driving: Get the Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html (citing *Alcohol-Impaired Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Oct. 2017), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812450).

[13] *Alcohol-Impaired Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Oct. 2017), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812450.

[14] Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453, 465 (2015); *Drunk Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/risky-driving/drunk-driving (citing a 2010 study).

[15] *Estimated Number of Arrests*, *2018 Crime in the United States*, FED. BUREAU INVESTIGATION: UNIFORM CRIME REPORTING (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-29.

[16] *DUI Statistics*, BACTRACK, https://www.bactrack.com/blogs/expert-center/35040645-dui-statistics (last visited Oct. 16, 2019).

A. Congress and the States' Attempt to Remedy the Overarching Issue

Congress has long recognized the need to combat the problems created by alcohol-impaired drivers. "Alcohol impairs balance, motor coordination, decision-making . . . [and] produces detectable memory impairments beginning after *just one* or two drinks."[17] DWI and DUI laws were enacted to directly combat this problem. Congress passed the National Minimum Drinking Age Amendment of 1984,[18] which authorized the Secretary of Transportation to "withhold a percentage of . . . federal highway funds from states in which the purchase or public possession of any alcoholic beverage by a person who is less than 21 years of age is lawful."[19] Since then, all states have endorsed 21 years of age as the legal drinking age and 0.08% as the BAC limit.[20] Utah has taken an initiative and recently lowered its BAC maximum threshold to 0.05%.[21] The resulting statistics from these efforts show that drunk-driving fatalities have decreased by 48%,[22] and drunk-driving fatalities for motorists under the age of 21 have decreased by 80%.[23] Yet the problem, highlighted by the aforementioned statistics, is nowhere near solved.

States have gone even further and have enacted implied consent laws—which require "motorists, as a condition of operating a vehicle within the states, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense."[24] These laws also call

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[17] Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, 27 ALCOHOL RES. & HEALTH 186–96 (2003) (emphasis added).
[18] 23 U.S.C.S. § 158 (2018).
[19] South Dakota v. Dole, 483 U.S. 203, 205 (1987).
[20] Editorial Staff, *Legal BAC Limits in Different States, Counties, & Cities*, ALCOHOL.ORG, https://www.alcohol.org/dui/bac-limits/ (last updated December 18, 2019).
[21] Nicole Nixon, *Utah First in the Nation to Lower its DUI Limit to .05 Percent*, NPR, https://www.npr.org/2018/12/26/679833767/utah-first-in-the-nation-to-lower-its-dui-limit-to-05-percent (last visited November 7, 2019).
[22] *Drunk Driving Fatality Statistics*, FOUND. FOR ADVANCING ALCOHOL RESP., https://www.responsibility.org/alcohol-statistics/drunk-driving-statistics/drunk-driving-fatality-statistics/ (last visited Oct. 16, 2019).
[23] *Id.*
[24] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019); *see also* State v. Entrekin, 47 P.3d 336, 338 (Haw. 2002); People v. Harris, 184 Cal. Rptr. 3d 198, 2010 (Cal. App. Dep't Super. Ct. Feb. 19, 2015).

for significant consequences, varying statewide, if and when motorists withdraw consent. The most typical punishment is an immediate suspension or revocation a motorist's license.[25] Refusal may also be used as evidence in subsequent criminal prosecution.[26] The statistics show the need for states to keep their roads safe, and the states have tried to combat the problem accordingly.

B. The Supreme Court's Recognition of the Problem

The Supreme Court has also recognized drunk driving as a significant interest.[27] Because of the "vital public interest" in highway safety,[28] states have not only been tasked with removing unsafe drivers (i.e. drunk drivers) from the road, but also to collect evidence that will stand up in the court of law. Law enforcement officers must be able to test BAC accurately enough to be admitted into evidence in a court proceeding.[29] One of the principal methods in BAC testing is a roadside breathalyzer, which is usually administered before an arrest is made.[30] Breathalyzer tests are the most efficient methods of testing BAC content.[31] They also tend to be relatively accurate and extremely reliable in capturing BAC evidence because federal standards require such.[32] After an arrest is made, officers usually use an "evidential breath test" at the police station.[33] But,

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[25] *Harris*, 184 Cal. Rptr. 3d at 210; *but see* Richard Cowen, *NJ to Impose New Penalties for Drunken Driving Starting Dec. 1: What You Need to Know*, USA TODAY NETWORK, https://www.northjersey.com/story/news/2019/11/27/nj-new-drunk-driving-law-take-effect-dec-1-heres-what-know/4275332002/ (last visited Jan. 29, 2020). NJ eliminates license suspensions for most first-time offenders (those under a BAC of 0.15%) but requires convicted DWI drivers to install ignition locks. Ignition locks require the motorist to have a BAC under 0.05% in order for the car to start.

[26] *Id.*

[27] *Mitchell*, 139 S. Ct. at 2535–36. The Supreme Court has called highway safety a compelling interest and paramount. The Court has referred to the aftermath of irresponsible driving as "slaughter comparable to the ravages of war." Lastly, the Court has spoken of the "frequency of preventable collisions as tragic and astounding." *Id.* at 2536.

[28] *Id.* at 2535.

[29] *Id.* at 2536.

[30] *Basics of Drunk and Drugged Driving: A DUI/DWI FAQ*, NOLO, https://www.nolo.com/legal-encyclopedia/drunk-driving-dui-dwi-faq.html [hereinafter *Basics of Drunk and Drugged Driving*].

[31] Birchfield v. North Dakota, 136 S. Ct. 2160, 2166 (2016); *See* Alex Jefferson, *How Do Alcohol Breathalyzers Work and How Accurate Are They?*, PROCTOR CARS, http://www.proctorcars.com/how-do-alcohol-breathalyzers-work-and-how-accurate-are-they/; Craig Freudenrich, *How Breathalyzers Work*, HOW STUFF WORKS, https://electronics.howstuffworks.com/gadgets/automotive/breathalyzer.htm.

[32] *Birchfield*, 136 S. Ct. at 2168 (stating that breathalyzers must be approved by the National Traffic Safety Administration).

[33] *Basics of Drunk and Drugged Driving*, *supra* note 30.

officers are sometimes put in a position where individuals refuse to submit to these breathalyzer tests, or the officer cannot obtain a proper reading because of the stupor of the motorist. The remaining option becomes to administer a blood draw or urine test.

The Fourth Amendment protects an individual's right to be "secure in their persons . . . against unreasonable searches" and provides that "no Warrants shall issue, but upon probable cause."[34] The extraction of a blood sample is a highly effective means of measuring BAC.[35] Yet, the Supreme Court has often ruled that blood sample tests are more invasive than breath tests and should require a warrant in accordance with the Fourth Amendment.[36] "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'"[37] Hence, the Supreme Court has usually stated that "precedent normally requires a warrant for a lawful search," unless the search falls within a recognized exception.[38]

While recognizing the government's need for evidence, the Court has recognized only a few categorical instances under the exigent circumstances exception in which warrantless searches are acceptable.[39] Thus, while the cognizable interest of public safety and collecting evidence have long been recognized, an individual's right of their person has been equally, if not more important to the Court—until *Mitchell*.

III. Pre-*Mitchell* DUI Criminal Procedure Law Under the Fourth and Fifth Amendment

[34] U.S. CONST. amend. IV.
[35] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2536 (2019) (citing Schmerber v. California, 384 U.S. 757, 771 (1966)).
[36] *Id.* at 2525; Birchfield v. North Dakota, 136 S. Ct. 2160, 2160 (2016).
[37] Missouri v. McNeely, 569 U.S. 141, 148 (2013) (citing Winston v. Lee, 470 U.S. 753, 760 (1985)); *see also* Skinner v. Ry. Labor Execs.' Assn., 489 U.S. 602, 616 (1989).
[38] *Mitchell*, 139 S. Ct. at 2534; *McNeely*, 569 U.S. at 148.
[39] *Mitchell*, 139 S. Ct. at 2547. These are scenarios where officers: must enter a home to provide assistance to someone who is seriously injured; are in pursuit of a fleeing suspect; need to enter a burning building to extinguish a fire; or must prevent the imminent destruction of evidence. *Id.*

Before *Mitchell*, DUI criminal procedure law dictated certain results whether an individual was in the Fourth or Fifth Amendment realm. While both Amendments purport to provide protection to those individuals suspected of DUIs, that is not necessarily the case. And while defendants typically fared better under Fourth Amendment precedent because of the privacy interest at stake, the Court left open the question of just how important those privacy interests are.

A. DUI and the Fifth Amendment

The Fifth Amendment states that, "[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law[.]"[40] Under Fifth Amendment case law, individuals generally argued, albeit with little success, that being coerced to undergo blood tests by virtue of a statute (implied consent laws) or under the threat of penalty, violates their constitutional right against self-incrimination and due process.[41] The Court has usually held that the penalties imposed for refusing to undergo a blood draw in connection with a DUI arrest are legitimate.[42]

1. The Right Against Self-Incrimination Vis-à-Vis "Coerced" Blood Test Results

In *Schmerber v. California*, petitioner and a companion were drinking at a bar.[43] Upon leaving, petitioner allegedly struck a tree with his vehicle, and when found by officers, was taken to the hospital for treatment.[44] Both at the scene and in the hospital two hours later, the responding officer smelled liquor on the petitioner and observed other signs of inebriation.[45] While petitioner received treatment for injuries sustained in the accident, the officer informed the petitioner that he

[40] U.S. CONST. amend. V.
[41] *Mitchell*, 139 S. Ct. at 2533.
[42] *Id.*
[43] 384 U.S. 757, 758, n.2 (1966).
[44] *Id.*
[45] *Id.* at 769 ("[P]etitioner's eyes were 'bloodshot, watery, sort of a glassy appearance.'").

was under arrest.[46] Subsequently, the officer asked a nearby physician to withdraw a blood sample, despite petitioner's refusal.[47]

The Court was tasked to determine "whether the withdrawal of the blood and admission in evidence of the analysis involved in [the] case violated petitioner's [Fifth Amendment] privilege."[48] The Court answered in the negative, stating the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood . . . in this case did not involve compulsion to those ends."[49] The Court did not disagree that the BAC evidence was invasively obtained through compulsion,[50] but stated that "the privilege is implicated *only* when the person is guaranteed the right to 'remain silent unless he chooses to speak in the unfettered exercise of his own will.'"[51] Therefore, the Fifth Amendment privilege against self-incrimination is a "bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.'"[52]

2. Drivers' Refusal of a BAC Test is Allowed to be Used in Court

Following *Schmerber*'s lead, the Court in *South Dakota v. Neville* similarly held that a defendant's refusal to submit to a BAC test may be used against that individual in a court of law.[53] In *Neville*, police pulled the defendant over after he blew through a stop sign.[54] The officers immediately perceived signs of intoxication and placed the defendant under arrest when he failed

[46] *Id.* at 758.
[47] *Id.* at 759.
[48] *Id.* at 761.
[49] *Schmerber*, 384 U.S. at 761.
[50] *Id.* at 762 ("The withdrawal of blood necessarily involves puncturing the skin for extraction, and . . . is evidence of criminal guilt.").
[51] *Id.* at 763 (emphasis added).
[52] *Id.* at 764.
[53] 459 U.S. 553 (1983).
[54] *Id.* at 554.

field sobriety tests.[55] When the officers asked the defendant to submit to a BAC test or lose his license for refusing, the defendant admitted he would not pass the test and refused multiple times.[56]

South Dakota law stated that the refusal to submit to a BAC test may be admissible into evidence at the trial.[57] Furthermore, South Dakota had enacted an implied consent law which deemed drivers to have consented to a chemical test of BAC if arrested for DWI.[58] Having both statute and recent precedent to stand on, the Court held that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."[59]

The Court noted that the Fifth Amendment is limited to prohibiting "the use of 'physical or moral compulsion' exerted on the person asserting the privilege."[60] The state's act (giving the defendant a choice to submit to testing or refuse and have his license suspended) did not rise to the level of coerced testimony.[61] Hence, where a police officer has lawfully requested a blood-alcohol test without coercion, and a defendant refuses, the defendant will be unable to assert the privilege against self-incrimination in a subsequent court proceeding.[62]

The Supreme Court's rulings on the Fifth Amendment right against self-incrimination do not bode well for defendants accused of DUIs when presented before a court of law. Typically, as mentioned above, the Court does not construe physical evidence as testimonial. Therefore, the state's legitimate government interest in road safety, and the lack of testimonial evidence,

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[55] *Id.* at 554–55. The defendant staggered and fell against his car, reeked of alcohol, and could not walk in a straight line.
[56] *Id.* at 555–56.
[57] *Id.* at 556.
[58] *Id.* at 559.
[59] *Neville*, 459 U.S. at 564.
[60] *Id.* at 562.
[61] *Id.* at 563 ("He could submit to self-accusation, or testify falsely (risking perjury) or decline to testify (risking contempt). But the Court has long recognized that the Fifth Amendment prevents the State from forcing the choice of this 'cruel trilemma' on the defendant.").
[62] *Id.* at 564.

outweigh an individual's right to exclude the evidence of their own refusal.[63] The Court narrowly read the Fifth Amendment to include only certain types of *testimony,* none of which included protections for DUI drivers.[64] But the Court went in a different direction on the subject of an individual's Fourth Amendment right against unreasonable searches, specifically of their person.

B. DUI and the Fourth Amendment

The Fourth Amendment guarantees an individual's right to be "secure in their persons . . . against unreasonable searches" and further provides that "no Warrants shall issue, but upon probable cause."[65] Under Fourth Amendment case law, the Supreme Court has consistently held that blood draws constitute searches because they are intrusive in and of themselves.[66] The Court has recognized that certain elements are necessary in order for a search warrant to be valid: law enforcement must have probable cause to request the warrant and a neutral magistrate judge must issue it.[67] "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[68]

But there are well-defined exceptions to the warrant requirement. First, the "exigent circumstances" exception, which allows warrantless searches to prevent the imminent destruction of evidence, is most often discussed in the context of BAC testing.[69] Exigent circumstances precedent requires a totality of the circumstances analysis on a case-by-case basis.[70] Exigent circumstances usually relate to imminent danger, emergency, or the destruction of evidence, along

[63] *See Neville*, 459 U.S. 553 (1983); *Schmerber*, 384 U.S. 757 (1966).
[64] *Id.*
[65] U.S. CONST. amend. VI.
[66] Birchfield v. North Dakota, 136 S. Ct. 2160, 2178 (2016); *Schmerber*, 384 U.S. at 767; Missouri v. McNeely, 569 U.S. 141, 148 (2013).
[67] Timothy Andrea, Comment, *The Exigencies of Drunk Driving:* Cripps v. State *and the Issues with Taking Drivers' Blood Without a Warrant*, 59 B.C. L. REV. E. SUPP. 482, 485 (2018).
[68] *Schmerber*, 384 U.S. at 767.
[69] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2534 (2019).
[70] *Id.* at 2533.

with the inability to obtain a warrant.[71] Aside from these scenarios, law enforcement may forego obtaining a warrant if there is probable cause to believe that a crime has been committed and delay would hinder the officer's interest in preventing or investigating the alleged crime.[72]

The Court has also applied the "search-incident-to-arrest" doctrine, which allows officers who are carrying out a lawful arrest to make a warrantless search of the arrestee's person.[73] Two distinct characteristics of the exception have been noted: a search may be made (1) of the *person* of the arrestee by virtue of the lawful arrest; and (2) of the *area* within the control of the arrestee.[74] The search-incident-to-arrest exception does not require case-by-case adjudication, but instead, the lawful arrest alone justifies a full search of the person.[75]

The analysis of the cases involving blood draws under the Fourth Amendment is relatively similar to the analysis under the Fifth Amendment: the Court (1) reviewed the factual scenario to determine if there was probable cause for the DUI; (2) determined whether there was time to secure a warrant or circumstances that would delay or prevent a law enforcement officer from obtaining one; and (3) then determined if the officer's interest in obtaining evidence was sufficient to outweigh the arrestee's Fourth Amendment right against warrantless searches and seizures. Most of the time, the Court would find probable cause. The difficulty in the assessment has usually turned on prongs two and three.

1. Exigent Circumstances Case Law

i. *Schmerber v. California*

[71] *Id.* at 2535 n.3 ("[W]e allow police to proceed without a warrant when an occupant of a home requires "emergency assistance," Brigham City v. Stuart, 547 U.S. 398, 403 (2006); when a building is on fire, *see* Michigan v. Tyler, 436 U.S. 499, 509 (1978); and when an armed robber has just entered a home, *see* United States v. Santana, 427 U.S. 38 (1976).").
[72] Andrea, *supra* note 67, at 485.
[73] Birchfield v. North Dakota, 136 S. Ct. 2160, 2174 (2016).
[74] *Id.* at 2175–76.
[75] *Id.* at 2176.

In 1966, the Supreme Court decided *Schmerber* both on Fourth and Fifth Amendment grounds. As Part III(A)(1) of this Comment stated, the Court did not find the admission of the warrantless blood search into evidence as violative of an individual's protection against self-incrimination.[76] As to the Fourth Amendment claim, the Court faced the question of "whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness."[77] Although there certainly was probable cause for the arrest,[78] the Court had to grapple with whether the officer was permitted to request the blood draw, or whether the officer should have secured a warrant first.[79]

The Court approached the Fourth Amendment claim with particular concerns of an individual's right to be secure in their persons. The majority noted that search warrants are required for searches "where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer . . . ."[80] "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is *indisputable* and *great.*"[81]

In weighing the facts, the Court utilized a totality of the circumstances approach. The facts revealed that the officer was delayed in arriving to the hospital where the petitioner was admitted because the scene of the underlying accident needed to be cleared.[82] The officer was in a difficult

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[76] *See supra* Part III(A)(0).
[77] Schmerber v. California, 384 U.S. 757, 768 (1966).
[78] *Id.* at 769 ("The police officer . . . smelled liquor on petitioner's breath, and testified that petitioner's eyes were 'bloodshot, watery, sort of a glassy appearance.'").
[79] *Id.*
[80] *Id.* at 770.
[81] *Id.* (emphasis added).
[82] *Id.* at 770–71 ("[T]ime had to be taken to bring the accused to a hospital and to investigate the scene of the accident[.]").

position. The Court held in the government's favor, noting that in *this particular case*, the attempt to secure BAC evidence was proper.[83] The fleeting evidence (dissipating percentage of alcohol)[84] coupled with the emergency (responding to the accident) [85] caused an exigent circumstance under the Fourth Amendment.

It is important to note two things about this decision: (1) the Court reached its judgment "only on the facts of the present record;"[86] and (2) it in no way indicates that the Constitution permits more substantial intrusions, or intrusions under *other* conditions.[87] The language stresses that the Court only reached the decision here because of the facts of *this* case. Thus, the Justices may have gone the other way if the officer had not been delayed because of the accident he was investigating. Lastly, both search-incident-to-arrest and exigent circumstances exception doctrine share the "threatened destruction of evidence" concern. Thus, this Court's characterization as "an appropriate incident to petitioner's arrest" is largely insignificant.

ii. *Missouri v. McNeely*

In 2013, the Court was faced with a similar *Schmerber* situation in *Missouri v. McNeely*, which involved a defendant who was speeding and swerving across a road's center line before being pulled over by an officer.[88] When the officer witnessed more signs of drunken stupor,[89] he asked the defendant to perform field-sobriety tests, but the defendant refused to submit to a breathalyzer.[90] After further refusal by the defendant, and without ever trying to obtain a warrant, the officer drove straight to the hospital for blood testing.[91] The officer directed a hospital lab

[83] *Schmerber*, 384 U.S. at 772.
[84] *Id.* at 770.
[85] *Id.* at 771.
[86] *Id.* at 772.
[87] *Id.* (emphasis added).
[88] Missouri v. McNeely, 569 U.S. 141, 145 (2013).
[89] *Id.* ("The officer noticed . . . McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath.").
[90] *Id.* at 145.
[91] *Id.* at 145–46.

technician to take a blood sample, and charged McNeely with DWI when the sample measured the defendant's BAC as 0.154%.[92] McNeely moved to suppress the results of the blood test, arguing that the officer violated his Fourth Amendment right when he took defendant's blood without a warrant and without consent.[93] The trial court agreed with the defendant.[94] On appeal, the Missouri Court of Appeals transferred the case to the Missouri Supreme Court.

Missouri's Supreme Court looked directly to *Schmerber* and recognized that lower courts must engage in a totality of the circumstances analysis when "determining whether exigency permits a nonconsensual, warrantless blood draw."[95] Furthermore, the Missouri Supreme Court concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol related case."[96] Thus, the Missouri Supreme Court affirmed the lower court's decision.

The Supreme Court granted certiorari to resolve the question of "whether natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations."[97] The Court stressed that an invasion of person is readily apparent when a needle is shoved under the skin and into the veins.[98] When such an invasion is present, there is significant importance in a "neutral and detached magistrate" to make the decision to proceed with the request

[92] *Id.* at 146.
[93] *Id.* at 146.
[94] *McNeely*, 569 U.S. at 146 (holding that there were no circumstances which the officer faced that he could not practicably obtain a warrant).
[95] *Id.* at 147.
[96] *Id.* ("[E]xigency depends heavily on the existence of additional "special facts," such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital . . .").
[97] *Id.*
[98] *Id.* at 148 ("[A]bsent an emergency, no less [than obtaining a search warrant] could be required where intrusions into the human body are concerned.").

or not.[99] Lastly, the Court stressed the importance of performing a totality of the circumstances analysis, stating that each case must be evaluated on its own facts.[100]

In the present case, the Court noted that BAC evidence dissipates in a "*gradual* and *relatively predictable"* manner.[101] Thus, the Court held, "in those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment *mandates* that they do so."[102] The Court recognized the important reality that officers can take steps to secure a warrant in an efficient and quick manner in today's technologically advanced society. First, an officer can attempt to secure a warrant while the suspect is being transported to a medical facility.[103] Next, under the amended Federal Rules of Civil Procedure, magistrate judges may issue a warrant based on sworn testimony communicated over the phone or other reliable electronic means.[104] Furthermore, jurisdictions have streamlined the warrant process by providing standard-form warrant applications for drunk-driving investigations.[105] The Court also mentioned that "experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense."[106] The technological advancements have made it so police officers may secure warrants more quickly, while leaving the assessment of exigency in the hands of a neutral magistrate judge, as past precedent has always required.

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[99] *Id.*
[100] *McNeely*, 569 U.S. at 150–51 ("[O]ur judgment [in the *Schmerber* case] that there had been no Fourth Amendment violation was strictly based on the facts of the present record.").
[101] *Id.* at 153 (emphasis added). The trial court heard testimony which indicated that an individual's blood typically decreases by "approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed." *Id.* at 152.
[102] *Id.* at 152 (emphasis added).
[103] *Id.* at 153.
[104] *Id.* at 154. *See also id.* at 154 n.4; Fed. R. Crim Pro. 4.1.
[105] *McNeely*, 569 U.S. at 155.
[106] *Id.* at 156.

Lastly, the Court recognized that although there is a need to secure such evidence, states have enacted laws—namely implied consent laws—that provide penalties for a driver's refusal to submit to BAC testing.[107] As noted under Fifth Amendment precedent, states may use a driver's refusal to submit to a BAC test as evidence in court and may even revoke or suspend the alleged drunk driver's license. The Court also noted that a "majority of [s]tates either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal . . . or prohibit nonconsensual blood tests altogether."[108] Evidence suggests that in states that permit nonconsensual blood testing pursuant to a warrant, their use reduces "breath-test-refusal rates and improve[s] law enforcement's ability to recover BAC evidence."[109] In weighing the totality of the circumstances, the Supreme Court ultimately held that the natural metabolization of alcohol in the bloodstream presents no *per se* exigency to justify a blood test without a warrant.[110]

2. Search-Incident-to-Arrest Case Law

In 2016, the Supreme Court faced the question of whether the search-incident-to-arrest exception provides a mechanism by which officers may force individuals suspected of DUIs to submit to blood sample draws.[111] In *Birchfield*, the petitioner drove his car off of a highway and into a ditch.[112] Upon seeing the petitioner struggle to back out of the ditch, a state trooper approached his car and recognized the telltale signs of drunkenness: strong scents of alcohol,

[107] *Id.* at 160–61. All fifty states "have enacted implied consent laws that require motorists, as a condition of operating a motor vehicle within the States, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." People v. Harris, 184 Cal. Rptr. 3d 198, 210 (Cal. App. Dep't Super. Ct. Feb. 19, 2015); *see also Mitchell*, 139 S. Ct. at 2531.
[108] *McNeely*, 569 U.S. at 161–62 and ensuing footnotes.
[109] *Id.* at 162.
[110] *Id.* at 165.
[111] Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
[112] *Id.* at 2170.

bloodshot and watery eyes, and slurred speech.[113] The officer then administered a breathalyzer test with the consent of petitioner, which read a BAC of 0.254%, over three times the legal limit.[114]

Officers ordinarily do not use road-side breathalyzer tests for evidentiary purposes, so the responding officer advised the petitioner of his obligation under North Dakota law to undergo further BAC testing.[115] The petitioner refused to agree to a blood draw, and subsequently plead guilty to a misdemeanor violation of the refusal statute.[116] In the trial court, petitioner argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the blood draw.[117] The trial court rejected this argument, and the North Dakota Supreme Court affirmed.[118]

Under the search-incident-to-arrest exception to the Fourth Amendment for BAC testing, the Court balanced the need for the promotion of legitimate governmental interests versus an individual's right against intrusion into their privacy.[119] In deciding the case, the Supreme Court stressed, as it has in the exigent circumstances exception realm, that BAC tests (whether through breath or blood) are searches for the purposes of the Fourth Amendment.[120] The Court also distinguished the differences in breath and blood tests. Breath tests implicate fewer privacy concerns because: (1) they are not intrusive (an individual only blows into a tube); (2) only reveal one piece of information (the amount of alcohol in the subject's breath); and (3) blowing into a tube is not an experience likely to cause any further embarrassment inherent in any arrest.[121] To the contrary, blood tests *do* implicate privacy concerns because: (1) they require piercing of the skin and extraction of a part of an individual's body, and (2) the sample gives law enforcement

[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 2170–71.
[117] *Birchfield*, 136 S. Ct. at 2171.
[118] *Id.*
[119] *Id.* at 2176.
[120] *Id.* at 2173.
[121] *Id.* at 2177.

authorities information that can provide details outside of the scope of the drunk-driving arrest.[122] The Court also noted that states and the federal government have already imposed numerous measures to deter potential drunk drivers.[123]

The reality is that police officers often face quick judgment calls that the Fourth Amendment does not require to be broken down and logged in a specific manner.[124] States, rightfully so, are concerned with evidence being lost because of the often difficult decisions that officers need to make—tend to the situation at hand versus trying to secure a warrant. With these governmental concerns in the forefront, the Court proceeded to discuss the need for warrants. Warrants protect privacy in two ways: (1) "[T]hey ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found; and (2) if probable cause is found by the magistrate, the warrant "limits the intrusion on privacy by specifying the scope of the search."[125]

In evaluating whether the blood draw was constitutional under the Fourth Amendment, the Court stressed that the search-incident-to-arrest exception does *not* depend on an evaluation of the threat of evidence loss in a particular case.[126] Instead, the search-incident-to-arrest doctrine is limited by the nature of the privacy interest at stake.[127] Thus, the Court concluded that BAC testing of drunk-driving suspects under the search-incident-to-arrest exception permits a warrantless *breath* test, but not blood test.[128] The privacy concerns of individuals implicated by breath tests is minimal, while the states' interest in the BAC test is great.[129] Yet, "[b]lood tests are significantly

[122] *Id.* at 2178.
[123] *Birchfield*, 136 S. Ct. at 2166–70.
[124] *Id.* at 2179.
[125] *Id.* at 2181.
[126] *Id.* at 2183.
[127] *Id.; see also* Riley v. California, 573 U.S. 373, 374 (2014).
[128] *Birchfield*, 136 S. Ct. at 2184.
[129] *Id.*

more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test."[130]

The Court made one final conclusion that will become the basis of this Comment:

> It is true that a blood test . . . may be administered to a person who is unconscious . . . or who is unable to do what is needed to take a breath test[.] But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police *may apply for a warrant if need be.*[131]

The Court foresaw that there may come a time where a breath test is impossible and a blood draw might be necessary, but a warrant still should be sought. Thus, the Court has still not provided a categorical exception when it comes to blood draws at this time, even after *Mitchell*.

C. Prior Case Law and How the Court has Discussed Exigent Circumstances, Intrusions, and Government Interests

The aforementioned case law demonstrates that the Court, in its discussion of the relevant Fourth Amendment protections, focused primarily on the right of individuals to be protected against unwarranted intrusion by the state[132] versus the need for law enforcement to secure evidence to determine what is reasonable. Thus far, the Supreme Court has regularly stated that "precedent normally requires a warrant for a lawful search," unless the search falls within a recognized exception.[133] The Court has especially opined that in the context of blood draws, "such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'"[134] In sum, the Court's language implies that unwanted blood draws are

[130] *Id.*
[131] *Id.* at 2184–85 (emphasis added).
[132] Schmerber v. California, 384 U.S. 757, 767 (1966).
[133] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2534 (2019); Missouri v. McNeely, 569 U.S. 141, 148 (2013).
[134] *McNeely*, 569 U.S. at 148 (citing Winston v. Lee, 470 U.S. 753, 760 (1985)). *See also* Skinner v. Ry. Labor Execs.' Assn., 489 U.S. 602, 616 (1989).

extremely problematic because of their invasiveness.[135] This was true in both the search-incident-to-arrest exception and the exigent circumstances case law.

Further, the warrant requirement is not just a mere formality, but serves important purposes. Search warrants protect privacy in two main ways. Since the invasion into another's body in search of evidence of guilt is great, the importance of requiring authorization by a neutral and detached magistrate is indisputable.[136] This is further supported by the fact that an officer is often engaged in the "competitive enterprise of ferreting out crime."[137] Thus, having a neutral magistrate make an independent determination that probable cause exists to believe that evidence will be found is an important protection against unreasonable searches.[138] Secondly, if probable cause is found, the warrant would limit the "intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought."[139] The warrant requirement ensures that our rights as individuals are protected to the fullest extent possible.

Even more telling is the fact that warrants have become easier to secure now. As *Missouri v. McNeely* recognized, federal magistrate judges may issue warrants based on sworn testimony communicated over the phone or other reliable electronic means.[140] A majority of states now allow officers or prosecutors "to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail and video conferencing."[141] Warrants can now be secured in as little as five to fifteen minutes, suggesting the cases where exigency is actually compelling are few.[142]

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[135] *McNeely*, 569 U.S. at 159 ("We have never retreated . . . from our recognition that any compelled intrusion into the human body implicates *significant, constitutionally* protected privacy interests.") (emphasis added).
[136] *Id.* at 148; *Schmerber,* 384 U.S. at 770.
[137] *Schmerber*, 384 U.S. at 770 (citing Johnson v. United States, 333 U.S. 10, 13–14 (1948)).
[138] Birchfield v. North Dakota, 136 S. Ct. 2160, 2181 (2016).
[139] *Id.* (citing United States v. Chadwick, 433 U.S. 1, 9 (1977)).
[140] *McNeely*, 569 U.S. at 154 (citing Fed. R. Crim. Proc. 4.1).
[141] *Id.* and accompanying n.4.
[142] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2548 (2019).

Lastly, the Court has accounted for the government's interest in securing evidence to convict individuals of the alleged crime they have committed. Without evidence that will stand up in the court of law (accurate BAC measurements), the government will have a lesser chance to convict the accused.[143] This is especially important given that the percentage of alcohol in an individual's body decreases from the moment they stop drinking.[144] The need to keep roadways safe against the evils of DUI is another key factor.[145]

Therefore, the Court has always addressed an individual's right to privacy against unwarranted searches and seizures as vital. The Court has stopped short of saying that blood draws are acceptable under a searches-incident-to-arrest exception because the blood draw intrudes on an individual's liberty.[146] In the exigent circumstances line of cases, the Court has consistently called for a totality of the circumstances analysis to determine whether the officer indeed had no time to secure a warrant.[147] Search warrants have long been held to protect the rights of individuals, and this is no different in the blood draw line of cases. But what the Court had not yet addressed was whether the privacy interest is so significant that mandating a blood draw is consistent with precedent, or treads in new territory.

IV. The *Mitchell v. Wisconsin* Decision and its Implications

The story of *Mitchell* is similar to every DUI case discussed thus far: a motorist is detained by law enforcement, the responding officer witnesses signs of inebriation, and subsequently attempts to secure BAC evidence for a conviction. But this time, there was no victory for the driver who attempted to get the unconsented blood draw results suppressed. This section will

[143] *See id.* at 2536.
[144] *McNeely*, 569 U.S. at 152; *Schmerber v. California*, 384 U.S. 757, 770 (1966).
[145] *See generally* South Dakota v. Dole, 483 U.S. 203 (1987).
[146] *See* Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).
[147] *See* Schmerber v. California, 384 U.S. 757 (1966); Missouri v. McNeely, 569 U.S. 141 (2013).

focus on the sharp contrast between the plurality, the concurrence, and the dissent, and the important takeaways from all sides.

A. Facts of *Mitchell*

A Sheboygan Police Department officer received a tip that petitioner Mitchell appeared to be drunk upon climbing into his vehicle and driving off.[148] Upon finding Mitchell near a lake, the officer noticed that Mitchell was showing the suggestive signs of intoxication: slurred speech, stumbling movement, and the inability to stand upright without the help of two responding officers.[149] After Mitchell's preliminary breathalyzer test recorded a BAC level of 0.24%, he was arrested and was to be driven to the police station for an evidentiary grade breathalyzer.[150]

As the officers began to transport Mitchell, they realized that his condition was worsening. By the time they reached the station, Mitchell could not even take the necessary breath test.[151] As Mitchell's condition further deteriorated, the officers decided to head to the hospital for a blood test.[152] Mitchell then lost consciousness and had to be wheeled into the hospital.[153] Nevertheless, the officer read Mitchell the rights of refusal statements associated with Wisconsin's implied consent law and upon hearing no response, asked hospital staff to administer the blood draw, which produced a BAC of 0.222%.[154] Notably, this reading was done ninety minutes after his arrest.[155]

Mitchell was ultimately charged and convicted of violating two drunk-driving provisions, which he challenged on Fourth Amendment grounds against unreasonable searches, stating that the blood draw was conducted without his consent and without a warrant.[156] Mitchell argued, to

[148] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2532 (2019).
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Mitchell*, 139 S. Ct. at 2532.
[155] *Id.*
[156] *Id.*

no avail, that the BAC evidence should have been suppressed.[157] The Wisconsin Supreme Court affirmed the convictions, and the Supreme Court granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."[158]

B. The Plurality's Opinion Produces a Puzzling "Almost Always" Test

The plurality started its analysis by stating that past decisions have been based on the "precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving."[159] This signals that the plurality does not view *Mitchell* as necessary falling into the exigent circumstances or search-incident-to-arrest doctrines. Specifically, in Part II of the *Mitchell* opinion, the Supreme Court goes through case law primarily centered on the Fifth Amendment, where it has approved of enforcing BAC tests promoted by implied consent laws. But, as discussed in Part III(A) and III(B) of this Comment, there was a vast difference in the outcomes for petitioners in the Fifth versus Fourth Amendment cases.[160]

While admitting in Part II of *Mitchell*'s opinion that "precedent normally requires a warrant for a lawful search," the Court noted there are "well-defined exceptions to this rule."[161] The Court quickly mentioned *Birchfield* as a case where the search-incident-to-arrest exception to BAC testing was applied, and where the Court ultimately held that a drunk-driving arrest taken alone will justify a warrantless breath test, but not a blood test.[162] The Court then moved on to *McNeely*, where it held that the exigent circumstances exception allows warrantless searches to "prevent the

[157] *Id.*
[158] *Id.*
[159] *Id.* at 2533.
[160] *See supra* Part III(A) & (B).
[161] *Mitchell*, 139 S. Ct. at 2533.
[162] *Id.*

imminent destruction of evidence;" however, the "fleeting quality of BAC evidence alone" was not enough.[163] So far, so good for petitioner.

Then, the plurality discussed *Schmerber*, where it held that a blood test *was* justified when a delay would threaten the destruction of evidence and pressing needs (i.e. safety, health, etc.) were extant.[164] That case, as discussed, was based solely on its own facts. The Supreme Court's plurality opinion in *Mitchell* nonetheless found that this case was similar to *Schmerber* on the spectrum of exception cases, in that Mitchell's drunken stupor and unconsciousness created a medical condition that needed to be treated with urgency.[165] Furthermore, his intoxicated state "deprived officials of a reasonable opportunity to administer a [standard evidentiary] breath test."[166] The relevant question then becomes, what is an officer to do when a driver's stupor "eliminates any reasonable opportunity for *that* kind of breath test."[167]

But in Part III of the opinion, the plurality shifted its analysis and focused on the broader regulatory scheme, defined as the government's interest in protecting roads from unsafe drivers. "Highway safety is a vital public interest."[168] The Court harped on the point that alcohol-related accidents have taken roughly 10,000 to 20,000 lives per year since 1982[169] and recognized that the BAC limits adopted by every state have decreased over the years to the 0.08% limit currently.[170]

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 2533.
[167] *Mitchell*, 139 S. Ct. at 2534.
[168] *Id.* at 2535. The Court goes on to mention that it has called highway safety both a compelling and paramount interest. It goes further by saying that "[t]wice we have referred to the effects of irresponsible driving as 'slaughter' comparable to the ravages of war . . . . The frequency of preventable collisions . . . is 'tragic' and 'astounding.'" *Id.* at 2535–36 (internal citations omitted).
[169] *Id.* at 2536 ("In the best years, that would add up to more than one fatality per hour.").
[170] *Id.* This is down from the initial limit of 0.15%.

States have also enacted penalties for drivers who exceed a higher BAC threshold, which the Court opined has led to a decrease in the number of annual fatalities.[171]

Enforcing BAC limits requires a test that will stand up in court, and blood samples are a "highly effective means of measuring the influence of alcohol."[172] The Court stated that testing must be done promptly because "it is a biological certainty that alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour."[173] Lastly, the Court claimed that when a driver becomes unconscious, blood tests are "essential for achieving the compelling interests described above."[174] The Court's plurality creates a fork in the road; does the case truly drive towards the exigent circumstances line of cases, or, does the plurality try to bucket *Mitchell* in both an exigent circumstances *and* a regulatory reasonableness style analysis?

In order to reach its conclusion, the Court related this case to *Schmerber*, which follows the premise that "exigency exists when: (1) BAC evidence is dissipating *and* (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application."[175] The Court then said that unconsciousness not only creates a pressing need but is itself a medical emergency.[176] To the plurality, it is possible that officers may have to provide other assistance when responding to a drunk-driving related incident, and thus, we cannot put officers in a position to "choose between prioritizing a warrant application to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the

[171] *Id.* ("From the mid-1970's to the mid-1980's, 'the number of annual fatalities averaged 25,000; by 2014 . . ., the number had fallen to below 10,000.").
[172] *Id.* at 2536.
[173] *Mitchell*, 139 S. Ct. at 2536.
[174] *Id.*
[175] *Id.* at 2537 (emphasis added).
[176] *Id.* at 2537–38 ("[T]he suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care. Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital . . . and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value.").

detriment of its evidentiary value and all the compelling interests served by BAC limits."[177] Although the Court accepted the proposition that technology has made warrant applications much quicker, it further opined that the time to secure a warrant has not disappeared.[178]

The Court ostensibly hinged its holding on the compelling interests of the government:

> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to a hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment.[179]

But, the Court did not rule out the possibility that "a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties."[180]

C. Justice Thomas's Concurrence Calls for a Categorical Exception

On the other hand, Justice Thomas viewed the plurality's rule as "difficult-to-administer" and stated, "[e]xigent circumstances are generally present when police encounter a person suspected of drunk driving—except when they aren't."[181] His Honor opined that "it will nevertheless burden both officers and courts who must attempt to apply it."[182] Instead, Justice Thomas called for a *per se* rule, which posited that regardless of the driver's consciousness, the natural metabolization of alcohol in the blood stream *alone* creates an exigency once the police

[177] *Id.* at 2538 ("Police [officers] may have to ensure that others who are injured receive prompt medical attention; they may have to provide first aid themselves . . . they may have to deal with fatalities . . . [or] preserve evidence at the scene and block or redirect traffic to prevent further accidents.").
[178] *Id.* at 2539.
[179] *Mitchell*, 139 S. Ct. at 2539.
[180] *Id.*
[181] *Id.*
[182] *Id.*

have probable cause to believe the driver is drunk.[183] Justice Thomas's route, if that of the majority in the future, would modify *Birchfield* to create a much more lenient standard for officers, giving them *carte blanche* to execute blood draws at any reasonable suspicion of inebriation.

The concurrence admitted that Fourth Amendment case law has required that a warrant must generally be secured, but stated that the imminent destruction of evidence is at risk in every single drunk-driving arrest, which implicates the exigent circumstances doctrine.[184] Thus, according to Justice Thomas, the *per se* rule would not undermine the totality of the circumstances analysis endorsed by *McNeely* and *Birchfield* because a certain, dispositive fact is always present in DUI cases—destruction of evidence vis-à-vis metabolization of alcohol.[185] Lastly, Justice Thomas took one last jab at the plurality by concluding its rule was "more likely to confuse than clarify" because officers and courts will be burdened by the plurality's rebuttable presumption.[186]

D. The Scathing Dissent

The dissent, written by Justice Sotomayor and joined by two other Justices, attacks the plurality's proposition that police will be forced to choose between an emergency situation and securing evidence. Pointing to the Fourth Amendment, Justice Sotomayor stated that when there is time to secure a warrant, one must be sought.[187] To the dissent, the fact that Wisconsin admitted that the officer had time secure a warrant to draw Mitchell's blood should have ended the inquiry.[188] The dissent further harped that Wisconsin did not even argue that this was an exigent

[183] *Id.*
[184] *Id.* at 2540.
[185] *Mitchell*, 139 S. Ct. at 2541.
[186] *Id.* at 2539, 2541. Justice Thomas's concern has already come to light. *See* People v. Eubanks, 2019 IL 123525, *P65 n.7 (Ill. Dec. 5, 2019) (requesting clarification on the rebuttable presumption).
[187] *Id.* However, there are other warrantless exceptions that have nothing to do with time. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Michigan v. Tyler, 436 U.S. 499, 509 (1978); United States v. Santana, 427 U.S. 38, 42–43 (1976).
[188] *Id.* Between transporting Mitchell to the hospital and the blood draw, 90 minutes elapsed, and at no point was an attempt to secure a warrant made. *Id.* at 2541–42.

circumstances exception case, but instead, claimed that the blood draw was lawful because of the implied consent statute.[189]

After describing the Fourth Amendment's guarantees, the dissent stated that "[t]he warrant requirement is not a mere formality; it ensures that necessary judgment calls are made 'by a neutral and detached magistrate,' not by the officer engaged in the often competitive enterprise of ferreting out crime."[190] A warrant ensures that a police officer is not made to be the sole interpreter of the Constitution's protections.[191] According to the dissent, it is only when an exception applies that law enforcement will not violate an individual's Fourth Amendment right.[192] Justice Sotomayor opined, "For decades, this Court has stayed true to the Fourth Amendment's warrant requirement . . . even in the face of attempts categorically to exempt blood testing from its protections."[193]

Had precedent been followed, the answer would have been straightforward. In *Schmerber*, the exigent circumstances justified the search because of the unusual delay of the investigation by the responding officer, which provided no time to seek a warrant.[194] In *McNeely*, the Court ruled that blood tests are *not* categorically exempt from the warrant requirement, and instead, each case must be determined on its own facts (as was *Schmerber*).[195] Chief Justice Roberts stated there that "the Fourth Amendment mandates officers to obtain a warrant before a blood sample can be

[189] *Id.* at 2542.
[190] *Id.* at 2543 (citing Schmerber v. California, 384 U.S. 757, 770 (1966)).
[191] *Mitchell*, 139 S. Ct. at 2543.
[192] *Id.* The dissent mentions the exigent circumstances exception, the consent exception (voluntary consent), and the exception for searches incident to arrest (discussed previously in *Birchfield*). *See also* Kentucky v. King, 563 U.S. 452, 450 (2011); Georgia v. Randolph, 547 U.S. 103, 109 (2006); Riley v. California, 573 U.S. 373, 382 (2014).
[193] *Mitchell*, 139 S. Ct. at 2543.
[194] *Id.* at 2544.
[195] *Id.*

drawn."[196] In *Birchfield*, the Court again rejected a categorical attempt to exempt blood draws from the warrant requirement in relation to the searches-incident-to-arrest doctrine.[197]

Thus, the dissent said, *Mitchell* should have been resolved squarely by past precedent. Unless time did not permit an officer from obtaining a warrant, they *must* get one before ordering a blood draw.[198] Just seven years ago, *McNeely* reiterated the standard necessary to resolve DUI cases involving exigent circumstances. There, the Court made many points that are even more relevant today. First, blood draws are different than the categorical approaches that the Court has allowed in the past in "destruction of evidence" cases,[199] namely because there are inherent delays when an officer seeks a blood test, regardless of whether or not a warrant is obtained.[200] Police officers will almost always have to transport an individual to the hospital or medical facility for a medical professional to draw blood. That in itself may give officers time to seek a warrant.[201]

According to the dissent, "[E]xperts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense."[202] Magistrate judges may issue warrants through sworn testimony over the phone or other means, which has sped up the process to the point where judges can issue warrants in five to fifteen minutes.[203] Lastly, and maybe most importantly, BAC dissipates *gradually* and *predictably*.[204] These facts, relevant in *McNeely*, are even more pertinent now with our ever advancing society.

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[196] *Id.;* Missouri v. McNeely, 569 U.S. 141,173 (2013) ("If there is time to secure a warrant before blood can be drawn, the police *must* seek one.") (emphasis added).
[197] *Mitchell*, 139 S. Ct. at 2544.
[198] *Id.* at 2544–45.
[199] *Id.* at 2547–48. These are scenarios where police officers are just outside the door to a home and evidence is about to be destroyed; or a person is about to become injured; or a fire has broken out.
[200] *Id.* at 2548.
[201] *Id.*
[202] *Id.* at 2548.
[203] *Mitchell*, 139 S. Ct. at 2548.
[204] *Id.*

This analysis leads back to the very important point that *Schmerber* and *McNeely* advocated for in the first place—the fact that not every case will be the same, and each will require a holistic assessment.[205] In many scenarios, as in *Mitchell* itself, the police will have enough time to secure a warrant *and* address the medical needs of an individual prior to the evidence dissipating.[206] Thus, the dissent opined that the Fourth Amendment's warrant requirement, as well as past precedent, dictates that officers must seek a warrant prior to attempting to draw blood from a person suspected of drunk driving.[207] The plurality's decision takes away the police's heavy burden to justify a warrantless search to one of only urgent need.[208]

V. *Mitchell v. Wisconsin* Creates a Fork in the Road on Where it Sits in DUI Case Law

Other than the confusing "almost always" rule that comes out of *Mitchell*, the opinion is also dissimilar to the Court's pronouncements in the cases mentioned in Section III of this Comment. The Court has consistently refused to categorically include blood draws under the exigent circumstance or search-incident-to-arrest exception to the Fourth Amendment, yet *Mitchell* goes the other way when the driver is unconscious.[209]

A. Which Road Should Lower Courts Travel: The Regulatory Reasonableness or Exigent Circumstances Road?

The plurality started off by analyzing Fourth Amendment precedent and what is required when assessing claims.[210] The opinion could have been decided on these grounds alone under the exigent circumstances exception doctrine. But the Court decided to go further and in Section III of the opinion,[211] and weighed the interests of the government in addressing the larger regulatory

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[205] *Id.* at 2550.
[206] *Id.*
[207] *Id.*
[208] *Id.* at 2551.
[209] *See* Birchfield v. North Dakota, 136 S. Ct. 2160 (2016); Missouri v. McNeely, 569 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757 (1966).
[210] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (2019).
[211] *Id.* at 2534–39.

problem—unsafe public roads due to impaired drivers. With the bifurcated opinion, the question becomes whether DUI case law is about exigent circumstances or truly about keeping roads safe. The difference is imperative in deciding whether we resolve future cases on public policy grounds or stick to the traditional analysis. For lower courts, the question becomes, which part of the opinion control?[212]

There is an inherent question of deference when deciding cases using the traditional analysis (exigent circumstances) versus public policy grounds (keeping roads safe). It suffices to say that the latter is more deferential to law enforcement, similar to rational basis review of constitutionality. With the bifurcated opinion, the plurality makes it tough to follow what the basis was for its ultimate decision: exigent circumstances or the need for law enforcement officers to respond to situations without further endangering the public. Justice Alito seemingly harped on the idea that officers cannot be forced to choose between attempting to procure a warrant versus attending to the needs at hand.[213]

Of course, not all searches are violative of the Fourth Amendment—only those that are unreasonable.[214] Time and time again the Court has held that a blood draw is intrusive in and of itself.[215] The Court has also stated that BAC evidence dissipating, alone, is never enough for the exigency circumstance exception to apply.[216] In stark contrast to past precedent, the *Mitchell* Court decided that the elements of public safety and government enforcement of DUI laws were enough

[212] In a similar case, the Court of Appeals of Missouri, Eastern District, Division Five, similarly followed the Supreme Court's path for regulating road safety before ultimately concluding that exigent circumstances existed. *See* State v. Gray, No. ED104743-01, 2019 WL 5381873, at *6-7 (Mo. Ct. App. Oct. 22, 2019) (stating that BAC tests "are needed to enforce laws that save lives").
[213] *Mitchell*, 139 S. Ct. at 2538; Nina Totenberg & Bill Chappell, *Supreme Court Affirms Police Can Draw Blood From Unconscious Drivers*, NPR (June 27, 2019), https://www.npr.org/2019/06/27/732852170/supreme-court-affirms-police-can-draw-blood-from-unconscious-drivers.
[214] *Birchfield*, 136 S. Ct. at 2173.
[215] *See Mitchell*, 139 S. Ct. 2525; *Birchfield*, 136 S. Ct. 2160; *McNeely*, 569 U.S. 141; *Schmerber*, 384 U.S. 757.
[216] *McNeely*, 569 U.S. 141.

to cross the line of reasonableness to circumvent an individual's constitutionally-protected right against unreasonable searches.[217] The Court's statistical analysis of drunk driving incidents in the United States put the nail in the coffin in its ruling, making it known that a drunk driver is not considered on equal footing as others.[218] The statistical analysis is used as a guidepost to show that the Court was driven by public policy, something that it had not necessarily relied upon in previous DUI exigent circumstances case law. The plurality opinion is paradigmatic in this respect: DUI case law is no longer exclusively within the province of warrantless exceptions analysis; instead, it is now underneath a broader umbrella that purely assesses reasonableness.

The plurality had a relatively easy route to conclude the same way without focusing on the implications of road safety. The Court discussed the exigent circumstances exception and posited that unconsciousness is a medical emergency within itself.[219] Fleeting evidence due to the emergency created by the unconsciousness would provide the requisite combination to satisfy DUI exigent circumstances precedent. This would also follow the holistic analysis that is central to every exigent circumstance case. While still problematic because of the distinctions with *Schmerber*,[220] this route could have achieved the same result without the doctrinal confusion.

B. Trying to Apply *Mitchell* to New Facts

If the facts of *Mitchell* are changed just nominally, it becomes difficult to determine how a reviewing court should rule on a defendant's Fourth Amendment challenge. Take, for example, the following scenario. First, assume that Mitchell is still visibly inebriated. He then gets in his van, turns it on, turns on the heat, pulls the seat back in recline, and starts to doze off. A bar patron

[217] *Mitchell*, 139 S. Ct. at 2535–36.
[218] *Id.* at 2536.
[219] *Id.* at 2537.
[220] *Id.* at 2543. The holding is troubling because Wisconsin admitted that the officer never attempted to secure a warrant even though he had ample time to. This makes the connection to *Schmerber* more distant because law enforcement there was delayed from obtaining evidence by a few hours since the officer was responding to an accident caused by the petitioner.

who noticed Mitchell leave, now sees him in the vehicle and decides to call for help. When officers respond, they tap on the window to inquire further.

The officers observe that Mitchell is falling in and out of consciousness, so they decide to request a breathalyzer test. Since Mitchell is incapable of blowing into the breathalyzer, the officers take him directly to an urgent care for a blood draw. Although Mitchell does not consent to the blood draw, the officers, relying on *Mitchell v. Wisconsin*, go ahead and order one anyway. How should a defense attorney proceed? More importantly, how should the court decide the case?

If Mitchell's attorney argues that Mitchell's blood draw should be suppressed under the regulatory road of the plurality's opinion, Mitchell would lose before he steps foot in court. The line of thought here goes, the arrest and ensuing blood draw were both proper because Mitchell was a danger to the public when he entered his vehicle. It was paramount that officers kept him off the road, even though he was not yet driving, to ensure that no one would possibly become another statistical victim of another DUI accident. Furthermore, since Mitchell was clearly inebriated and falling in and out of consciousness, and could not perform a breathalyzer test, the only way to secure evidence was through a blood draw. The court, for the sake of efficiency and following the spirit of *Mitchell*'s opinion, would be inclined to take this route as well.

An entirely more difficult analysis proceeds from the second, more windy, exigent circumstances exception road. Defense counsel would prefer this route because the government must show more than keeping roads safe. The *Mitchell* Court reaffirms that the natural dissipation of alcohol is not enough to trigger a blood draw under the exigent circumstances prong. Therefore, the reviewing court would have to rely on Mitchell's condition when the officers approached him. Although he was deemed to be falling in and out of consciousness, there could be numerous explanations for such. It could have been just because of the heat in his vehicle. It could have

been because he was too drunk. The analysis would be more difficult because it would hinge on whether evidence needed to be secured (because it was dissipating) and whether a pressing need took priority over a warrant application. While the government could easily show the first prong was satisfied, the "pressing need" prong becomes murky. If the court holds a pressing need was non-existent, would it, like *Mitchell*, add a public policy argument to prevent the defendant from getting off scot-free? The difficulty, even in a scenario with slight factual changes, shows that this case was decided in a manner that can lead to confusion, and needs to be clarified moving forward.

VI. Conclusion

The dissent's opinion has an important message that applies sensibly in the context of the Fourth Amendment: if there is time for a warrant, one should be secured.[221] Warrants are important for numerous reasons and the Court has consistently advised that BAC testing should be left in the hands of neutral and detached magistrates, so as to not leave law enforcement as the sole interpreters of the Constitution's protections.[222] Today, there should be *more* focus on an individual's right to privacy and to be free from searches. *Mitchell* permits future courts reviewing DUI cases to apply a highly deferential standard—related to keeping the roads safe. That was not the intention of the Fourth Amendment and should not be the case today.

Regardless of where one surmises *Mitchell* fits in DUI case law, it is clear that the Court has expanded the exigent circumstances DUI doctrine to cast a wider net for the government to prosecute offenders under one of two avenues. The opinion currently creates an ironic hangover in that defense attorneys, courts, and law enforcement officers, will be unsure of which fork in the road will be the proper route to journey on. In order to clarify the confusion, the Court will need

[221] *Id.* at 2541.
[222] *Id.* at 2543; Missouri v. McNeely, 569 U.S. 141, 174 (2013); Mincey v. Arizona, 437 U.S. 385, 396 (1978) (citing Johnson v. United States, 333 U.S. 10, 13–14 (1948)); Schmerber v. California, 384 U.S. 757, 770 (1966).

to clearly define whether future DUI cases are subject to the traditional analysis consisting of the exigent circumstances exception, or whether the cases should be assessed in light of the government's need to remove drunk drivers from the road as a matter of public safety.